106 FERC ¶ 61,024

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-77-001
Bridgeline Gas Marketing L.L.C., Citrus Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, L.L.C., and Enron North America Corp.	Docket No. RP03-311-001

ORDER DENYING REHEARING

(Issued January 22, 2004)

1. This order denies the requests for rehearing of the Commission's June 25, 2003 Order in these proceedings,[1] in which the Commission revoked the market-based rate authorities of Enron Power Marketing, Inc. (EPMI) and Enron Energy Services, Inc. (EESI) (collectively, Enron Power Marketers), and terminated the natural gas blanket marketing certificates of EESI, ENA Upstream Company, LLC (EEUA), Enron Canada Corp. (ECC), Enron Compression Services Company (ECS), Enron MW, L.L.C. (EMW), and Enron North America Corp. (ENA) (collectively, Enron Gas Marketers).

2. In the Revocation Order we found that the Enron Power Marketers and the Enron Gas Marketers engaged in a range of unjust and unreasonable practices,[2] from gaming in

[1] Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,343 (2003) (Revocation Order).

[2] See 15 U.S.C. § 717d(a) (2000); 16 U.S.C. § 824e(a) (2000).

the form of inappropriate trading strategies in the electric markets to 378 natural gas wash trades in 2000-01. We found that these activities warranted the revocation of the Enron Power Marketers' market-based rate authorities and the termination of the Enron Gas Marketers blanket marketing certificates.[3] We continue to hold the same.

3. Our action fulfills the Commission's obligation, pursuant to Sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§ 824d, 824e (2000), to prevent unjust and unreasonable practices and rates, and Sections 4, 5, and 7 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717c, 717d, 717f (2000), to prevent unjust and unreasonable practices and rates and activities not in the public convenience and necessity.

Background

4. On February 13, 2002, the Commission directed a Staff fact-finding investigation into whether any entity manipulated prices in electricity or natural gas markets in the West or otherwise exercised undue influence over wholesale electricity prices in the West, since January 1, 2000.[4]

5. On August 13, 2002, Staff released its Initial Report in Docket No. PA02-2-000. In that Report, Staff recommended the initiation of various company-specific proceedings[5] to further investigate possible misconduct, and recommended several generic changes to market-based tariffs to prohibit the deliberate submission of false information or the deliberate omission of material information and to provide for the imposition of both refunds and penalties for violations.[6]

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[3] Revocation Order, 103 FERC ¶ 61,343 at P 14-17; accord id. at P 51-56, 61-71.

[4] Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002).

[5] Docket Nos. EL02-113-000, EL02-114-000, and EL02-115-000. In recent months, the Commission has acted on a series of settlements in these dockets. E.g., Portland General Electric Company, 105 FERC ¶ 61,302 (2003); El Paso Electric Company, 104 FERC ¶ 61,115 (2003).

[6] Docket Nos. EL01-118-000 and EL01-118-001. The Commission has addressed this proceeding in Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003).

6. On March 26, 2003, the Commission released the Final Staff Report on Price Manipulation in Western Markets.[7] Concurrently, the Commission also issued a Show Cause Order[8] based on the evidence discussed in the Final Staff Report. The Show Cause Order found that the Enron Power Marketers apparently: (1) violated Section 205(a) of the FPA[9] by engaging in gaming; and (2) acted inconsistently with their market-based rate authority, not only by engaging in gaming, but also by failing to inform the Commission in a timely manner of changes in their market shares by gaining influence/control over others' facilities in violation of their market-based rate authority.

7. In addition, the Show Cause Order found that the Enron Gas Marketers apparently misused their authority under their natural gas blanket marketing certificates to make sales to and purchases from gas markets serving California at rates that were unjust and unreasonable from the summer of 2000 through the winter of 2000-2001. For instance, that order stated that this evidence indicated that the Enron Gas Marketers, through their electronic trading platform, EnronOnline (EOL),[10] apparently manipulated the price of natural gas at the Henry Hub located in Louisiana, on at least one occasion to profit from positions taken in the over-the-counter (OTC) financial derivatives markets (OTC markets).

8. In view of this evidence, the Show Cause Order directed the Enron Power Marketers to show cause why their authority to sell power at market-based rates should not be revoked by the Commission, and the Enron Gas Marketers to show cause why the Commission should not terminate their blanket marketing certificates under Section 284.402 of the Commission's regulations[11] to make sales for resale at negotiated

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[7] Final Staff Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 2003) (Final Staff Report).

[8] Enron Power Marketing, Inc., et al., 102 FERC ¶ 61,316 (2003).

[9] 16 U.S.C. § 824d(a) (2000).

[10] The EnronOnline system is administered by Enron Networks, an Enron Corporation subsidiary. EnronOnline is a free, Internet-based, transaction system which allows the Enron Gas Marketers to buy from and sell gas to third parties.

[11] 18 C.F.R. § 284.402 (2003).

rates in interstate commerce of categories of natural gas subject to the Commission's NGA jurisdiction.[12]

9. After reviewing the submissions to the Show Cause Order and the responses thereto, the Commission issued the Revocation Order. The Commission revoked the market-based rate authorities of the Enron Power Marketers. It found that the Enron Power Marketers engaged in gaming in the form of inappropriate trading strategies: (1) False Import (i.e., Ricochet or Megawatt Laundering); (2) congestion-related practices such as Cutting Non-firm (i.e., Non-firm Export), Circular Scheduling (i.e., Death Star), Scheduling counter flows on out of service lines (i.e., Wheel Out), and Load Shift; (3) ancillary services-related strategies known as Paper Trading and Double Selling; and (4) Selling Non-firm Energy as Firm.[13] In addition, the Revocation Order found that the Enron Power Marketers failed to inform the Commission in a timely manner of changes in their market shares that resulted from their gaining influence/control over others' facilities, as required under their market-based rate authorizations.[14] The Commission concluded that such behavior: (1) undermines the functioning of the wholesale power market and our reliance on that market to ensure that rates are just and reasonable; (2) constitutes market manipulation and results in unjust and unreasonable rates; and (3) violates the express requirements, in the orders allowing the Enron Power Marketers to make sales at market-based rates, to report changes in their status.

10. With regard to the Enron Gas Marketers, the Revocation Order terminated their blanket marketing certificates. The Commission found that the Enron Gas Marketers engaged in wash trading on EOL that resulted in the manipulation of prices and that such activity is contrary to the fundamental purpose in granting the blanket marketing certificate. The Commission found that the termination of their blanket marketing certificates was "necessary to maintain the integrity and efficiency of the Commission's

[12] See 15 U.S.C. §§ 717, et seq. (2000).

[13] These practices are described in more detail in American Electric Power Service Corp., et al., 103 FERC ¶ 61,385 (2003), reh'g denied, 106 FERC ¶ 61,020 (2004), and also are discussed in Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003), reh'g denied, 106 FERC ¶ 61,024 (2004).

[14] See Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993); Enron Energy Services Power, Inc., 81 FERC ¶ 61,267 at 62,319 (1997). Moreover, to the extent that they were jurisdictional, they were not filed with the Commission.

program of authorizing natural gas marketers to make jurisdictional sales at negotiated rates."[15]

11. Rehearing requests of the Revocation Order have been timely filed by the Enron Power Marketers and Enron Gas Marketers (collectively, Enron Entities), as well as by Metropolitan Water District of Southern California, Nevada Power Company and Sierra Pacific Power Company, Snohomish County, Washington, City of Palo Alto, California, City of Santa Clara, California, and the California Parties.[16]

Discussion

12. The rehearing requests make many of the same arguments previously addressed in the Revocation Order. To the extent that these arguments warrant further Commission elaboration or new arguments are raised, we address them below.

A. Due Process

13. The Enron Entities argue that the Commission denied them due process by not providing for a formal trial-type evidentiary hearing before an administrative law judge. Specifically, they argue that the intent of a trader is an essential element to a finding that the trader engaged in either price manipulation or wash trading and that a trial-type evidentiary hearing is necessary to make that determination.[17] We disagree. As we stated in the Revocation Order, we do not find intent to be an issue in these proceedings.[18] These proceedings are neither criminal nor are they imposing sanctions or civil penalties on the Enron Entities. The authorization to sell power at market-based rates and natural gas at negotiated rates -- as opposed to traditional, cost-based rates – is a privilege, and granted if, and only if, the Commission determines that an applicant's use of such rates will be just and reasonable.[19] Having found that the Enron Entities engaged

[15] Revocation Order, 103 FERC ¶ 61,343 at P 66.

[16] People of the State of California, ex rel., Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

[17] Citing, e.g., CFTC v. Savage, 611 F.2d 270, 284 (9th Cir. 1979).

[18] Revocation Order, 103 FERC ¶ 61,343 at P 33 & n.25.

[19] See, e.g., Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993); Enron Energy Services Power, Inc., 81 FERC ¶ 61,267 (1997).

in a range of unreasonable practices (e.g., gaming and wash trading), it was well within the Commission's discretion to revoke that privilege, i.e., revoke their market-based rate authorities and blanket marketing certificates.

14. Furthermore, the Commission is certainly permitted to act without a trial-type evidentiary hearing.[20] There were no disputed issues that could not be resolved on this record.

15. The Enron Entities also were and are entitled to a meaningful opportunity to be heard.[21] Through their Show Cause submittals and through the instant request for rehearing,[22] the Enron Entities have been given a full opportunity to make their case. Thus, their right to due process has been protected (and in fact, they have exercised it, by responding to the Show Cause Order and the Revocation Order).

16. The Enron Entities also argue that the Commission denied them due process both by not providing them adequate notice that their behavior was prohibited and by not providing them adequate notice of the facts and law asserted against them in these proceedings. We disagree. While constitutional due process requirements mandate that the Commission's rules and regulations be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit,[23] this standard is satisfied "[i]f, by reviewing [our rules] and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards

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[20] See, e.g., Exxon Company, U.S.A. v. FERC, et al., 182 F.3d 30, 45-46 (D.C. Cir. 1999); Kansas Power and Light Company v. FERC, 851 F.2d 1479, 1484 (D.C. Cir. 1988); Ohio Power Company v. FERC, 744 F.2d 162, 170 (D.C. Cir. 1984); Cities of Batavia, et al. v. FERC, 672 F.2d 64, 91 (D.C. Cir. 1982); see also Williams Natural Gas Company, 53 FERC ¶ 61,060 at 61,188, order on reh'g, 53 FERC ¶ 61,231 at 61,966-67 (1990); Northwest Pipeline Corporation, 53 FERC ¶ 61,012 at 61,051-52 (1990); El Paso Natural Gas Company, 48 FERC ¶ 61,202 at 61,756-57 (1989).

[21] See, e.g., Mathews v. Eldridge, 424 U.S. 319, 333, 348-49 (1976); Ecee, Inc. v. FERC, 645 F.2d 339, 352 (5th Cir. 1981); see also Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524-25, 543-46 (1978).

[22] E.g., State of California, ex rel. Bill Lockyer, Attorney General v. FERC, 329 F.3d 700, 708-13 (9th Cir. 2003).

[23] See Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission, 108 F.3d 358, 362 (D.C. Cir. 1997) (Freeman).

with which the agency expects parties to conform."[24] The Commission's orders authorizing the Enron Power Marketers to sell power at market-based rates (which tracked Commission precedent[25]), and the blanket marketing certificate authorizing the Enron Gas Marketers to sell natural gas at negotiated rates, coupled with the Show Cause and Revocation Orders, satisfy this due process requirement "so long as [they are] sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."[26] And, in fact, these authorizations and orders meet this standard, as we explain below.

17. As applied by the courts, this standard has been held to allow for flexibility in the wording of an agency's rules and for a reasonable breadth in their construction.[27] The courts have recognized, in this regard, that regulations cannot begin to cover all of the infinite variety of cases to which they may apply and that "[b]y requiring regulations to be too specific, [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation."[28]

18. The Supreme Court has further noted that the degree of vagueness tolerated by the Constitution, as well as the relative importance of fair notice and fair enforcement, depend in part on the nature of the rules at issue.[29] In Hoffman, for example, the Court held that in the case of economic regulation (as opposed to criminal sanctions), the vagueness test can be applied in a less strict manner because, among other things, "the

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[24] See General Electric Co. v. EPA, 53 F.3d 1324, 1329-30 (D.C. Cir. 1995).

[25] Compare infra P 25-26 with supra note 14.

[26] See Freeman, 108 F.3d at 362. See also Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor, 674 F.2d 1177, 1185 (7th Cir. 1982) ("[T]he regulations will pass constitutional muster even though they are not drafted with the utmost precision; all that due process requires is a fair and reasonable warning.").

[27] See Grayned v. City of Rockford, 408 U.S. 104, 110 (1971) (holding that an anti-noise ordinance was not vague where the words of the ordinance "are marked by flexibility and reasonable breadth, rather than meticulous specificity.").

[28] See Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 730 (6th Cir. 1980).

[29] See Village of Hoffman Estates, et al. v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (Hoffman).

regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."[30]

19. Applying these standards here, we find that the Commission's orders authorizing the Enron Power Marketers to sell power at market-based rates (which tracked Commission precedent[31]) and the blanket marketing certificate authorizing the Enron Gas Marketers to sell natural gas at negotiated rates, coupled with the Show Cause and Revocation Orders, provided the Enron Entities with notice of the facts and law sufficient to satisfy the due process requirement. Given the breadth of the Enron Entities' Commission-jurisdictional activities, the number of filings they made with the Commission over the years, the number of proceedings before the Commission that they participated in, and the legal and other expertise they had available to them and made use of, we would be hard-pressed to conclude that the Enron Entities somehow did not understand the requirements of the FPA and NGA, our regulations and our precedent and policies.[32] Moreover, the Final Staff Report and proceedings in Docket No. PA02-2-000, as well as the Show Cause and Revocation Orders, provide more than adequate notice of the law and facts at issue.

20. With regard to the electricity markets and sales at market-based rates in those markets, the authorization to sell power at market-based rates, as opposed to at cost-based rates, is not a license to engage in the unjust and unreasonable market manipulations perpetrated by the Enron Entities.[33] Moreover, implicit in Commission orders granting market-based rates is a presumption that a company's behavior will not involve fraud, deception or misrepresentation.[34] Companies failing to adhere to such standards were

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[30] Id.; See also Texas Eastern Products Pipeline Co. v. OSHRC, 827 F.2d 46, 50 (7th Cir. 1987) ("Texas Eastern, as a major pipeline company, in which trenching and excavation are a part of its routine, had ample opportunity to know of the earlier interpretation, should have been able to see the sense of the regulations on their face, and if still in doubt Texas Eastern should have taken the safer position both for its employees and for itself.").

[31] Compare infra P 25-26 with supra note 14.

[32] See 16 U.S.C. § 824e(a) (2000) (prohibiting unjust, unreasonable, and unduly discriminatory or preferential practices); 15 U.S.C. § 717d(a) (2000) (same).

[33] See 16 U.S.C. § 824e(a) (2000) (prohibiting unjust, unreasonable, and unduly discriminatory or preferential practices).

[34] If the Enron Entities are arguing that they reasonably thought that, under the FPA and our regulations, precedent and policies, their fraudulent, deceptive and

(continued …)

and are subject to revocation of their market-based rate authority.[35] In addition, the Enron Power Marketers were expressly directed, when they were granted market-based rate authority, to inform the Commission promptly of changes in status (which would include changes in their generation market shares) that reflect a departure from the characteristics (such as generation market shares) that the Commission relied upon (indeed, expressly considered and relied upon) in granting market-based rate authority.[36]

21. With regard to the blanket marketing certificates, it was more than reasonable for the Commission to conclude that it has authority under the NGA to revoke a blanket marketing certificate's authorization as it applies to particular persons who have engaged in misconduct contrary to the Commission's fundamental purpose in granting the certificates.[37] Under NGA Section 7, in order for the Commission to issue a certificate, it must find that the certificated service "will be required by the present or future public convenience and necessity." In order for the Commission to carry out the NGA's purpose of providing customers what the Supreme Court has characterized as a "complete, permanent and effective bond of protection,"[38] it must have the authority to terminate a certificate when the holder violates the certificate by engaging in misconduct that

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(…continued)
misrepresentative practices were permitted as just and reasonable practices affecting jurisdictional rates, that argument is hardly credible.

[35] Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 99 FERC ¶ 61,272 at 62,153-54 (2002); accord Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 97 FERC ¶ 61,220 at 61,975-77 (2001); GWF Energy, LLC, et al., 98 FERC ¶ 61,330 at 62,390 (2002); New York Independent System Operator, Inc., 91 FERC ¶ 61,218 at 61,798-800 (2000), order on reh'g, 97 FERC ¶ 61,155 (2001); Washington Water Power Company, 83 FERC ¶ 61,097 at 61,462-64, order in response to show cause presentation, 83 FERC ¶ 61,282 (1998); Kansas City Power & Light Company, 74 FERC ¶ 61,066 at 61,175, order on reh'g, 75 FERC ¶ 61,244 (1996).

[36] See supra note14; accord Revocation Order,103 FERC ¶ 61,343 at P 36 & n.26, 51, 55.

[37] 15 U.S.C. § 717d(a) (2000) (prohibiting unjust, unreasonable, and unduly discriminatory or preferential practices).

[38] See Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959).

undermines the basic purpose for issuing the certificate in the first instance.[39] Moreover, Order No. 547, which granted the blanket marketing certificates, expressly stated that the Commission would monitor the operation of the market through the complaint process.

22. Therefore, there can be no reasonable doubt as to the fundamental "rules of the road" to comply with market-based rate authorizations and blanket marketing certificates, and we find the Enron Entities had sufficient notice of them.

B. Revocation of Market-Based Rate Authority

1. Unjust and Unreasonable Rates

23. The Enron Entities argue that the Revocation Order failed to justify action against them under Section 206 of the FPA. They argue that the Commission failed to demonstrate that the activities of the Enron Power Marketers resulted in unjust and unreasonable rates and that the rates were outside of the "zone of reasonableness."

24. As we stated in the Revocation Order and as our analysis below demonstrates, we find, based on the record in this proceeding, that the behavior of the Enron Power Marketers constitutes market manipulation and results in unjust and unreasonable rates.

25. The Enron Power Marketers' market-based rate privileges were granted, consistent with our precedent, based upon a finding that they lacked market power or had adequately mitigated their market power.[40] In Louisville Gas and Electric Company, 62 FERC ¶ 61,016 at 61,143-44 (1993) (footnotes omitted), the Commission explained the basis for the Commission's granting market-based rate privileges:

> The seller can demonstrate that it lacks market power (or has adequately mitigated its market power) if it can show that neither it nor any of its affiliates: (1) is a dominant firm in the sale of generation in the relevant market; (2) owns or controls transmission facilities through which the buyer could reach alternative sellers (or, if the seller or any of its affiliates does own such facilities, it has adequately mitigated its ability to block the buyer from reaching other sellers); and (3) can erect or control any other barrier to

[39] To rule otherwise would be to find that granting a certificate under NGA Section7 authorizes rates that are unjust and unreasonable under NGA Sections 4 and 5. Phrased differently, a certificate under NGA Section 7 does not entitle the certificate holder to charge rates that are unjust and unreasonable under NGA Sections 4 and 5.

[40] See supra note14.

> market entry. Additionally, before allowing non-traditional pricing, the Commission has required a showing that there exists no affiliate abuse.

26. The Enron Power Marketers, in contrast, exercised unmitigated market power in the form of gaming through multiple inappropriate trading strategies. They were able to erect and control barriers to market entry by not only engaging in inappropriate trading strategies, but also by filing false schedules in the California markets that misrepresented the nature of electricity to be supplied and the intended load to be served. As explained in the signed plea agreements of Timothy N. Belden and Jeffrey S. Richter, former Enron executives, the purpose of filing false schedules was to artificially increase congestion on California transmission lines, which, in turn, increased the market price for congestion fees for transmission between zones.[41]

27. It is also clear that affiliate abuse existed. The Final Staff Report documents that Enron routinely disregarded the corporate separation of the various Enron affiliates, and used one or another to facilitate misconduct. In fact, the Revocation Order notes one example involving EPMI:

> Traders nominally employed by EPMI frequently acted as employees of EOL and controlled the bid management software that produced the prices that users saw on their screens. Since EPMI routinely was one of the two parties to each EOL transaction, in essence, the same company that ran the trading platform was a party to transactions on that platform, a situation that would not be tolerated in a regulated trading exchange and which afforded traders from the power marketer a significant informational advantage over counter-parties.[42]

28. With regard to the "zone of reasonableness," the Enron Entities cite to Farmers Union Central Exchange, Inc., et al., 734 F.2d 1486, 1502 (D.C. Cir. 1984), and state that the Commission must establish a delineation of the "zone of reasonableness" to find whether a rate is "less than compensatory" or "excessive." They state that under the principles of Farmers Union, the delineation begins with an inquiry into the costs of the

[41] See U.S. v. Timothy N. Belden, (N.D. Cal. Case No. CR-02-0313-MJJ); U.S. v. Jeffrey S. Richter, (N.D. Cal. Case No. CR-03-0026-MJJ).

[42] Revocation Order, 103 FERC ¶ 61,343 at P 16.

Enron Power Marketers. The overwhelming evidence presented in the Final Report, in accordance with Farmers Union, makes such an inquiry unnecessary.[43]

29. In Farmers Union, the Court stated that "[r]ates that permit exploitation, abuse, overreaching or gouging are by themselves not 'just and reasonable.'"[44] In light of our findings that the Enron Power Marketers engaged in multiple gaming schemes and submitted false schedules to increase the market price for congestion fees for transmission between zones, it is clear that the rates permitted not only exploitation, but also abuse, overreaching, and gouging.

30. Therefore, in light of the overwhelming evidence that the Enron Power Marketers exercised and engaged in market manipulation, which resulted in unjust and unreasonable rates, we affirm our decision in the Revocation Order and find the Enron Power Marketers' rates to be unjust and unreasonable.

31. In any event, we also find that the Enron Power Marketers engaged in unjust and unreasonable practices. Trading strategies such as Circular Scheduling (i.e., Death Star), where the Enron Power Marketers scheduled energy in the opposite direction of congestion (counterflow), but no energy was actually put onto the grid or taken off the grid, were designed to generate payments for relieving transmission congestion by "fooling" the California Independent System Operator's computerized congestion management program with imaginary transactions. Such practices undermine the functioning of the wholesale power market and our reliance on that market to carry out the mandate of the FPA.

32. The Commission's response to these findings was to revoke the Enron Power Marketers' market-based rate authorities and immediately terminate their electric market-based rate tariffs. (The Commission added that, in the event that the Enron Power Marketers emerge from reorganization with a power marketing function, should they wish to charge market-based rates they must reapply for market-based rate authority.[45]) We again find this remedy to be reasonable in view of these findings.

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[43] Moreover, the Enron Entities having sought and been granted the privilege to charge market-based, i.e., non-cost-based, rates, the Enron Entities can now hardly claim that the Commission must justify its actions in these proceedings by reference to the Enron Entities' costs.

[44] Farmers Union, 734 F.2d at 1502 (emphasis in original); accord American Electric Power Service Corp., 106 FERC ¶ 61,020 at P 36 n.27 (2004).

[45] E.g., Revocation Order, 103 FERC ¶ 61,343 at P 93.

2. Business Relationships

33. The Enron Entities argue that the Commission erred in finding that the Enron Power Marketers violated their market-based rate authorizations by failing to report certain business relationships. They assert that the Commission failed to: (1) demonstrate that the alleged business relationships resulted in affiliation or long-term control over generation necessary to trigger the reporting requirements; and (2) provide evidence that the business relationships increased the Enron Power Marketers' market shares.

34. We find the Enron Entities' arguments to be unpersuasive; indeed, they essentially repeat earlier arguments. As we stated in the Revocation Order, the Final Staff Report explains that Enron created a marketing program based on the use of other entities' assets, thus avoiding large capital expenditures and the risk of owning its own resources, to carry out its various trading strategies. Enron focused not only on partnerships and alliances with investor-owned utilities, but also on smaller utilities, such as public utility districts, municipalities, and qualifying facilities. Enron, using these partnerships and alliances, gained market share.[46] Enron formed these business alliances or partnerships without notifying the Commission, as required under their market-based rate authorizations.[47]

35. In light of this evidence, we affirm our finding that the Enron Power Marketers' failure to inform the Commission in a timely manner of changes in their market shares that resulted from their gaining influence/control over others' facilities warrants revocation of their market-based rate authorities and termination of their market-based rate tariffs.

C. Termination of Blanket Marketing Certificate

1. Section 7 of the NGA

36. The Enron Entities continue to argue that the Commission lacks the legal authority under NGA Section 7 to revoke a certificate in the circumstances of this case. In addition, they argue that the Commission did not attach to blanket marketing certificates any condition that would prohibit a certificate holder from engaging in wash trades or

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[46] These partnerships and alliances are described in more detail in Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003).

[47] See supra note14; accord Revocation Order, 103 FERC ¶ 61,343 at P 36 & n.26, 51, 55. Moreover, to the extent that such arrangements were jurisdictional, they were not filed with the Commission under Section 205 or Section 203.

manipulating prices. They state that the Commission decided there should be no guidelines or criteria that limit the prices that parties could negotiate under the blanket marketing certificate.[48] Thus, they argue that, in effect, the Commission has added a new condition to the blanket marketing certificate. They contend, based upon the legislative history of NGA Section 7, that the Commission lacks the authority to attach a new condition to a certificate after it has been issued. Therefore, the Enron Entities argue, the Commission can only revoke a certificate if "the certificate holder fails to exercise the rights granted by the certificate in accordance with the terms and conditions under which it was issued." They further concede that negotiated rates are subject to being found unjust and unreasonable, but that the Commission must proceed under Section 5 of the NGA to make such a finding.

37. We find the Enron Entities's arguments to be misplaced. First, as we stated in the Revocation Order, the Commission has "authority under the NGA to revoke a blanket marketing certificate authorization as it applies to particular persons who have engaged in misconduct contrary to the Commission's fundamental purpose in granting the blanket marketing certificate,"[49] i.e., contrary to "foster[ing] a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of natural gas and the opportunity to make gas purchasing decisions in accord with market conditions."[50] This condition is not new, but rather was part of the certificate since its inception. As such, the Commission has the fullest ability to enforce the conditions of the blanket marketing certificate. In fact, the Enron Entities even agree that the Commission may revoke a certificate if "the certificate holder fails to exercise the rights granted by the certificate in accordance with the terms and conditions under which it was issued."

38. Second, the issue before us in the Revocation Order was whether the conduct of the Enron Gas Marketers was contrary to the fundamental premise of their blanket marketing certificates. Having found this to be true, the Commission terminated their blanket marketing certificates under Section 7 of the NGA. The cornerstone of our decision was the misconduct of the Enron Gas Marketers, i.e., engagement in wash trades and price manipulation, rather than the outcome of the conduct. Therefore, the Enron

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[48] This argument, rephrased, amounts to a claim that, since the Commission did not expressly say "no cheating," the Enron Entities were perfectly free to "cheat." To state it plainly is to discredit it.

[49] Revocation Order, 103 FERC ¶ 61,343 at P 69.

[50] Regulations Governing Blanket Marketer Sales Certificate, Order No. 547, FERC Stats & Regs., Reg. Preambles January 1991-June 1996 ¶ 30,957 at 30,719 (1992), order on reh'g, Order No. 547-A, 62 FERC ¶ 61,239 (1993).

Entities' argument that all sales pursuant to their blanket marketing certificates were at negotiated rates is inconsequential to our determination to terminate their blanket marketing certificates.

39. Moreover, the Commission does not have to proceed under Section 5 of the NGA in these circumstances because the Enron Gas Marketers' blanket marketing certificates were originally issued under, and so were terminated under, Section 7 of the NGA. To the extent Section 5 does apply, however, we find the practices, i.e., wash trading and price manipulation, to be unjust and unreasonable. As explained above, these practices undermined the fundamental purpose of the blanket marketing certificates. In addition, the creation of false price signals through wash trades is contrary to the goal of allowing gas purchasers to make purchasing decisions "in accord with market conditions."[51]

2. Price Manipulation and Wash Trading

40. The Enron Entities argue that the NGA does not prohibit price manipulation or wash trading. They also argue that specific intent, market power and the existence of an artificial price are all essential elements in determining price manipulation and that the Commission has not demonstrated any of these. With regard to wash trades, although the Enron Entities find the Commission's definition[52] unobjectionable, they argue that the Commission must find specific intent in order to find a prohibited transaction. In addition, the Enron Entities argue that, even if each of the 378 wash trades identified in the Final Staff Report and the Revocation Order that occurred during the 53,445 "choice market" periods studied is a wash trade, 378 is a low number.[53] Also, they argue that the Final Staff report provides no evidence that any of the wash trades distorted markets, increased prices or hurt customers.

41. We find the Enron Entities' analysis to be misplaced and incorrect. First, with regard to wash trades, the Revocation Order stated that the participation in wash trades for no legitimate business purpose is anti-competitive and deceptive. Wash trades can mislead the market in a number of ways, including by sending false price signals to other market participants and making the market at particular points appear more liquid than it really is. More importantly, wash trades undermine the fundamental purpose of Order No. 547, which is to "foster a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of

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[51] Id.

[52] A prearranged pair of trades of the same good between the same parties, involving no economic risk and no change in beneficial ownership.

[53] We are not persuaded that "cheating" only 378 times is acceptable behavior.

natural gas and the opportunity to make gas purchasing decisions in accord with market conditions."[54] In essence, wash trades by themselves are enough to allow the Commission to terminate a gas marketer's blanket marketing certificate, regardless of intent and regardless of the number of trades.

42. Second, it is clear from the evidence in the Final Staff Report that on July 19, 2001, the price of natural gas was manipulated at the Henry Hub. The Enron Entities do not challenge the facts that occurred on that day. We repeat them here:

> One of the most egregious examples of abuse through EOL resulted in the manipulation of natural gas prices at the Henry Hub located in Louisiana on at least one occasion to profit from positions taken in the over-the-counter (OTC) financial derivatives markets (OTC markets). Although the price change in the physical markets was only about $.10/MMBtu, Enron Gas Marketers nevertheless profited due to the effect that this small change in the physical price had on its large financial position; Enron Gas Marketers earned approximately $3.2 million from this manipulation.
>
> On July 19, 2001, a number of traders entered relatively large short positions in the financial markets through OTC swaps and Gas Daily financial swaps. These traders continued to increase the short positions throughout the initial phase of the manipulation, which was the period when the EOL market maker (who was, at times, the desk manager) quickly and steadily raised prices on EOL, resulting in the purchase of a very large amount of next-day physical gas. This purchasing caused prices in the financial markets to rise, but by a lesser amount.
>
> The financial traders stopped increasing their short positions near the end of the EOL market maker's buying streak, at a point when the EOL market maker stopped raising prices and began to hold prices steady at the high levels. Once the EOL market maker leveled out prices, the OTC swap began to fall. The EOL market maker then began to lower the prices and sold a very large amount of gas at rapidly falling prices. The falling of the physical price then further pushed down the OTC swap price, generating significant profits for the financial traders. These profits greatly exceeded the losses that were generated from the buying and selling of the physical gas.[55]

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[54] Order No. 547, FERC Stats & Regs., Reg. Preambles January 1991-June 1996 at 30,719.

[55] Revocation Order, 103 FERC ¶ 61,343 at P 63-65.

43. Therefore, we find that the engagement in wash trades and the manipulation of natural gas prices, standing alone, warrant the termination of the Enron Gas Marketers' blanket marketing certificates.

44. With regard to the Enron Entities' argument that the Commission is required to find that the Enron Gas Marketers had a specific intent to manipulate prices or to engage in wash trading and that the Enron Gas Marketers had market power or that an artificial price existed in the market, we find it to be unpersuasive. All of the case law[56] that the Enron Entities cite to support this argument involve allegations of trading practices that violated the Commodity Exchange Act[57] and the imposition of civil penalties and/or sanctions. Here, however, the Commodity Exchange Act is not at issue and we are not imposing a civil penalty and/or sanction, but simply withdrawing the Enron Gas Marketers' privilege to make jurisdictional sales at negotiated rates.

D. Retroactive Remedies

45. Other entities seeking rehearing argue that the Commission should impose retroactive remedies, such as revoking the Enron Entities' market-based rate authorities and blanket marketing certificates as of a date prior to June 26, 2003 or ordering disgorgement of profits prior to that date.

46. As we stated in Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices, 105 FERC ¶ 61,063 at P 7 (2003), these proceedings should be treated as Part 1b investigations.[58] Therefore, there can be no "parties" and thus no requests for rehearing. To the extent that we may have erroneously granted any interventions in the Revocation Order, we rescind those interventions. It further follows that the rehearing requests filed by the non-Enron Entities in these proceedings must be dismissed, as requests for rehearing can only be filed by parties.

47. In any event, these proceedings, and the Show Cause and Revocation Orders, were focused only on the prospective revocation of market-based rate authorities and blanket marketing certificates. Other remedies are beyond the scope of these proceedings. They

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[56] See, e.g., Reddy v. CFTC, 191 F.3d 109 (2d Cir. 1999) (involving artificial trades and sanctions); CFTC v. Savage, 611 F.2d 270, (9th Cir. 1979) (involving fraudulent activities and a permanent injunction); Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971) (involving price manipulation and sanctions).

[57] 7 U.S.C. §§ 1, et seq. (2000).

[58] 18 C.F.R. § 1b.11 (2003).

are the subject of, for example, the proceedings instituted in the orders cited in note 13, supra, as well as in San Diego Gas & Electric Company, et al., 102 FERC ¶ 61,317, order on reh'g, 105 FERC ¶ 61,066 (2003).

The Commission orders:

The requests for rehearing are hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.